No. 20,087

IN THE

United States Court of Appeals

For the Ninth Circuit

WALTER JOHNSON, individually and as Secretary-Treasurer of DEPARTMENT STORE EMPLOYEES UNION, LOCAL 1100, etc., et al.,
Appellants,

vs.

RAPHAEL WEILL & COMPANY, INC., d/b/a THE WHITE HOUSE, etc., et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF FOR APPELLEES JOHN M. ENGLAND, C. E. STROBEL AND WALTER J. HEMPY, TRUSTEES IN BANKRUPTCY OF RAPHAEL WEILL & CO., INC.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLEES

JOHN M. ENGLAND, C. E. STROBEL AND WALTER J. HEMPY, TRUSTEES IN BANKRUPTCY OF RAPHAEL WEILL & CO., INC.

STATEMENT OF THE CASE

On January 26, 1965, appellants herein, through their attorney, Robert P. Cowell, Esq., sent to George Bahrs, Esq., attorney for Raphael Weill & Co., Inc., d/b/a The White House (herein called "The White House") a letter (R. 14-15), in which the appellants

herein sought to arbitrate certain disputes alleged to exist between appellants and The White House.

On January 27, 1965, the day after said letter had been sent to The White House and before receiving any response thereto, appellants filed in the Superior Court for the State of California, in and for the City and County of San Francisco, their "Petition For Order Directing That Arbitration Proceed And Complaint For Injunctive Relief Pending Arbitration Award." (R. 4-11.) No attempt was made by appellants prior to the filing of said petition to comply with the provisions of Section 33 of the Collective Bargaining Agreement between appellants and The White House (R. 7-8), providing for reference of the disputes to an adjustment board before resort to arbitration.

Upon the filing of the petition on January 27, 1965, an ex parte temporary restraining order was entered by the Superior Court, restraining and enjoining The White House from dissipating its assets below the level of $158,000.00, and an order to show cause was entered thereon with a return date of February 9, 1965.

On February 3, 1965, The White House filed a voluntary petition in bankruptcy in the United States District Court for the Northern District of California, Southern Division, and subsequently was duly adjudicated a bankrupt. On the same date, C. E. Strobel was appointed as receiver for the bankrupt.

On February 8, 1965, the United States District Court having jurisdiction over the bankruptcy pro-

ceedings entered its order enjoining the further prosecution of suits against the bankrupt. (R. 47-48.)

On February 9, 1965, the return date set in the order to show cause entered by the Superior Court on January 27, 1965, a hearing was held before the Honorable Joseph Karesh, Judge of said Superior Court. There were present at said hearing Roland C. Davis, Esq., representing appellants, and George O. Bahrs, Esq., representing The White House. During the course of said hearing, the full text of the order which had been entered by the United States District Court on February 8 restraining further action against the bankrupt was read into the record. (Reporter's transcript of hearings before the Superior Court, pages 4-5.)[1] After said order had been read into the record and despite the clear terms thereof, counsel for appellants proceeded to prosecute appellants' application for an order requiring arbitration and for a preliminary injunction.

A continued hearing on the matter was held on February 10, 1965, at which said hearing the attorney for the receiver made a special appearance to object to the jurisdiction of the Court. (R.T. 22.) Ultimately on February 11, 1965, the Court entered an order directing arbitration and granting a preliminary injunction requiring the deposit in Court of the sum of $158,000.00, pending the arbitration award or further

[1]The reporter's transcript of the hearings held in the Superior Court on February 9, 10 and 11, 1965, has been made a part of the Record on Appeal by stipulation between appellants and these appellees. Said transcript will hereinafter for convenience be referred to as "R.T."

order of the Court. The Court never considered the scope of the arbitration proceedings.

Appellees, the trustees in bankruptcy of The White House, were not elected until February 24, 1965, and were neither parties to nor participated in any way in the state court proceedings above referred to.

On February 11, 1965, attorneys for The White House filed in the United States District Court for the Northern District of California, Southern Division, a petition for removal (R. 3) to that court of the state court action under the provisions of Section 1441 of the Judicial Code. (28 U.S.C. §1441.) The petition alleged that The White House was engaged in interstate commerce and that the matter was, therefore, within the original jurisdiction of the United States District Court pursuant to the provisions of Section 301(a) of the Labor Management Relations Act, as amended. (29 U.S.C. §185(a).)

On February 17, 1965, appellants filed a motion to remand pursuant to the provisions of 28 U.S.C. §1447(c). Said motion was denied on March 3, 1965.

Thereafter on March 16, 1965, a hearing was held on appellees' motion to dissolve the orders of the Superior Court, the trustees in bankruptcy of The White House having intervened in the action by stipulation of the parties and after leave to intervene had been granted by the Referee in Bankruptcy having jurisdiction over the matter. On said date, appellees' motion was granted by the District Court and its order issued on March 23, 1965, dissolving all said state court orders.

Appellants on April 21, 1965, filed in this court a notice of appeal under 28 U.S.C. §1291 appealing from the orders of the United States District Court entered on March 23, 1965, dissolving the order compelling arbitration and preliminary injunction entered by the Superior Court of the State of California. No appeal was taken from the order denying the motion to remand entered by the United States District Court on March 3, 1965, and appellees, therefore contend that the denial of the motion to remand is not properly before this court. See *Gannon v. American Airlines,* 251 F.2d 476, 482 (10th Cir. 1958).

QUESTIONS INVOLVED

1. Whether the Court of Bankruptcy pursuant to jurisdiction granted it by Section 2 of the Bankruptcy Act (11 U.S.C. §11) is the proper forum for the determination of controversies concerning the assets of the bankrupt estate.

2. Whether the appellants made a proper showing for the granting of a preliminary injunction.

3. Whether the removal to a federal court of a suit arising under Section 301(a) of the Labor Management Relations Act (29 U.S.C. §185(a)) was proper.

SUMMARY OF ARGUMENT

The Bankruptcy Act, passed pursuant to constitutional authority specifically dealing with bankruptcy

(U.S. Const., Art. I, §8, cl. 8), gives the Bankruptcy Court exclusive jurisdiction to determine controversies involving the assets of the estate of a bankrupt, unless some specific federal statute clearly indicates that a particular type of controversy is to be adjudicated by some other tribunal.

Neither the National Labor Relations Act nor the Labor Management Relations Act contains any provisions which give arbitration pursuant to a collective bargaining agreement jurisdiction paramount to that afforded to the Bankruptcy Court by the provisions of Section 2 of the Bankruptcy Act.

Appellees argue that Section 2(1) of the Labor Management Relations Act (29 U.S.C. §152(1)), specifically refers to and includes trustees in bankruptcy and receivers as persons subject to the coverage of the law. The definition contained in Section 2(1) does not relate to proceedings under Section 301(a) of the Labor Management Relations Act (29 U.S.C. §185(c)) and merely relates to proceedings before the National Labor Relations Board.

Although appellants state that the arbitration process is accorded a "preferred status" by "National Labor Policy," appellants are unable to cite a single case where arbitration was ordered after the employer had been adjudicated a bankrupt under the provisions of the Bankruptcy Act. The cases cited by appellants for the proposition that the National Labor Relations Act takes precedence over the Bankruptcy Act all involved proceedings before the National Labor Relations Board, a tribunal given primary jurisdiction for

the resolution of certain labor disputes. See National Labor Relations Act §10 (29 U.S.C. §160).

Equality of distribution of available assets to creditors is the keystone of national bankruptcy policy as evidenced by the Bankruptcy Act and in order to effectuate said policy, Congress has given the Bankruptcy Court exclusive jurisdiction to determine controversies involving the estate of a bankrupt. Appellants have failed to show any reason why the judicial remedies available to them, i.e. the filing of a claim in the bankruptcy proceedings and/or the filing of a petition in reclamation, will not give them adequate relief. This case does not involve any broad question involving national labor policy, the only issues being the liability of the bankrupt estate for the payment of alleged pensions due to former employees of The White House. Monetary disputes of this type are handled by the Bankruptcy Court on a day-to-day basis in the normal course of the administration of any bankrupt estate.

Appellants sought below the extraordinary remedy of an injunction whereby certain assets presently in the custody of the Bankruptcy Court would be carved out of the estate pending an arbitration award. Such injunction should not be awarded unless it is clear that appellants are entitled to prevail on the merits of their claim and unless irreparable injury will result if an injunction be denied. As stated above, appellants have the remedy of filing a petition in reclamation in the Bankruptcy Court to determine the merits of their so-called trust claim and as long as

said remedy is available, the remedy of injunction is inappropriate. Also it is clear on the merits that appellants are unsecured creditors of the bankrupt estate and are not entitled to any priority over the other unsecured creditors. See *McKey v. Paradise,* 299 U.S. 119 (1936); *Schuyler v. Littlefield,* 232 U.S. 707 (1914).

The United States Supreme Court in *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957) held that Section 301 of the Labor Management Relations Act (29 U.S.C. § 185) created a substantive federal right. In *Teamsters Union v. Lucas Flour Co.,* 369 U.S. 95 (1962), the Supreme Court further amplified its position with respect to Section 301 by holding that said section preempted the field and that although suits to enforce Section 301 could be brought in the state courts under their concurrent jurisdiction (see *Dowd Box v. Courtney,* 368 U.S. 502 (1962)) that nevertheless in such action federal substantive law must be applied. It is quite clear from the above cited cases that an action under Section 301 "arises under" the laws of the United States and is removable under 28 U.S.C. § 1441. In certain areas where Congress did not intend an action to be removable, although arising under the laws or the Constitution of the United States, Congress has expressly so provided, and in the absence of such a provision, the general removable statute applies, allowing a defendant in a state court action to remove an action arising under the laws of the United States to the federal courts. That is clearly the situation in this case.

ARGUMENT

I.

ONCE A PETITION IN BANKRUPTCY HAS BEEN FILED, THE BANKRUPTCY COURT HAS EXCLUSIVE JURISDICTION OVER ALL PROPERTY OF THE BANKRUPT IN ITS ACTUAL OR CONSTRUCTIVE POSSESSION.

A. The exclusive jurisdiction of the Bankruptcy Court extends to a determination of all claims against the bankrupt estate and to the determination of title to property.

Section 2a(7) of the Bankruptcy Act gives the Bankruptcy Court jurisdiction to:

> "(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto . . ." (11 U.S.C. Section 11a(7).)

Section 2a(2) of the Bankruptcy Act gives the Court power to:

> "Allow claims, to disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;" (11 U.S.C. Section 11a(2).)

The purpose of the above cited sections, as well as other sections of the Bankruptcy Act, is to provide for the efficient, economical administration of the estates of bankrupts to the end that the maximum amount will be available for distribution to the creditors of the bankrupt and other parties entitled thereto. If the determination of claims were allowed to be adjudicated by other tribunals, the resulting delay and expense to the estate would be considerable.

If appellants do in fact have a claim against the estate of the bankrupt, it is as yet unliquidated and

cannot be allowed until filed with the Referee in Bankruptcy and the amount thereof ascertained. How and in what manner such ascertainment is had is a proper matter for the Bankruptcy Court to determine. Section 57d of the Bankruptcy Act (11 U.S.C. § 93d) provides:

> "Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: *Provided, however,* that an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act."

Even assuming that appellants herein have a valid trust claim, nevertheless, the proper court to determine such dispute is the Court of Bankruptcy, and the exclusive remedy of a trust claimant is to file a petition in reclamation. So long as the property involved was in the actual or constructive possession of the Bankruptcy Court at the time of the filing of the petition in bankruptcy, the Bankruptcy Court is the proper tribunal for the determination of questions of title. *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478 (1940); *Ex Parte Baldwin,* 291 U.S. 610 (1933). As the Court said in the *Baldwin* case:

"All property in the possession of the bankrupt of which he claims the ownership passes upon the filing of a petition into the custody of the Court of Bankruptcy. To protect its jurisdiction from interference, that Court may issue an injunction. . . . But the exclusive jurisdiction acquired by the Bankruptcy Court . . . was not limited to the prevention of interference with the use of the land . . . the jurisdiction extends also to the adjudication of the questions respecting the title." (291 U.S. at 615-616).

B. The Bankruptcy Court will not lightly abdicate its exclusive jurisdiction and will not do so unless there are supervening federal statutes or difficult problems of state law which can best be resolved by a state court tribunal, or unless some other irreparable injury can be shown by a claimant.

Although the Bankruptcy Court in the exercise of its judicial discretion may surrender its jurisdiction to another tribunal, such surrender will not occur except in unusual and exceptional circumstances. *Mangus v. Miller,* 317 U.S. 178 (1942). Appellants in this action have failed to show any compelling reasons why the Bankruptcy Court in this matter should surrender its exclusive jurisdiction.

The cases cited by appellants in their brief illustrate the above principles. Thus, they either involve supervening federal legislation, e.g., *Anderson v. Bigelow,* 130 F.2d 460 (9th Cir.), *cert. denied,* 317 U.S. 690 (1942) (involved Norris-LaGuardia Act which provides that *no* court of the United States may issue an injunction involving a labor dispute); *In re Spier Aircraft Corp.,* 137 F.2d 736 (3rd Cir. 1943), *cert.*

denied, 321 U.S. 770 (1944) (involved priority of navy wartime regulations over the Bankruptcy Act); *Cullen v. Bowles,* 148 F.2d 621 (2nd Cir. 1945) (explicit provisions of the Emergency Price Control Act vested exclusive jurisdiction in the Emergency Court of Appeals); *Order of Railway Conductors v. Pitney,* 326 U.S. 561 (1946) (involved a dispute expressly within the jurisdiction of an adjustment board created by statute to act in the case of jurisdictional disputes between unions), or difficult questions of state law and the Bankruptcy Court in the exercise of its judicial discretion held that the matters were more properly determined in state court tribunals. E.g., *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478 (1940) (involved unresolved state property law); *Milens v. Bostian,* 139 F.2d 282 (8th Cir. 1943) (involved effect of renunciation of one-quarter interest in the property of an interstate by an heir); *Layton v. Thayne,* 144 F.2d 94 (10th Cir.), *cert. denied,* 313 U.S. 572 (1944) (involved questions involving right of redemption).

The case of *Foust v. Munson S.S. Lines,* 299 U.S. 77 (1936), illustrates another limited area where the Court, in its judicial discretion, will abdicate its exclusive jurisdiction. In the *Foust* case, a federal court proceeding had been commenced with respect to a personal injury claim and the trustee in bankruptcy sought an injunction staying the proceeding. The Supreme Court held that the plaintiff would be irreparably injured by such a stay since a determination of the claim by the Bankruptcy Court might not allow the

plaintiff to proceed under a state direct action statute against an insurer who had insured the bankrupt's tort liability. The Court also found that allowing the federal court proceeding to continue could result in no prejudice to the bankrupt estate and in weighing the equities determined that the federal court proceedings should continue.

C. Neither the National Labor Relations Act, the Labor Management Relations Act nor "Federal Labor Policy" requires the Bankruptcy Court to abdicate its exclusive jurisdiction in favor of arbitration under the facts of this case.

Appellants rely heavily on the contention that Section 2(1) of the Labor Management Relations Act, as amended (29 U.S.C. § 152(1)), makes trustees in bankruptcy persons who are "covered by the Act" and that, therefore, trustees in bankruptcy are employers within the meaning of Section 301 of the Labor Management Relations Act (29 U.S.C. Section 185a).

Section 152(1) reads as follows:

> "Section 152. Definitions.
>
> When used in this *subchapter*—
>
> (1) the term 'person' includes one or more individuals, labor oragnizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." (Emphasis added.)

It should be noted that the above definition only applies to the particular subchapter in which Section 2(1) appears. Section 2(1) appears in subchapter II of chapter 7 of U.S. Code Title 29 whereas Section 301(a) appears in subchapter IV of chapter 7 of

Title 29. It is, therefore, apparent that the definition contained in Section 2(1) has no applicability to the meaning of terms as used in Section 301. The reference to "trustee in bankruptcy" is with respect to the definition of the word "person" and said word does not appear in Section 301. The word "person" does appear in the sections dealing with unfair labor practices (29 U.S.C. § 158), and with the jurisdiction of the National Labor Relations Board (29 U.S.C. § 160). Both Section 158 and Section 160 are part of subchapter II of chapter 7 to which the definition of "person" in Section 2(1) applies.

Section 301(a) deals with suits involving disputes between labor unions and "employers", and the definition of "employer" in Section 2 does not refer to trustees in bankruptcy. From the foregoing, it appears clear that a trustee in bankruptcy is subject to the jurisdiction of the National Labor Relations Board, but that nothing in the statute makes a trustee in bankruptcy subject to suit pursuant to Section 301.

The reasons for making a trustee in bankruptcy subject to the provisions of Sections 158 and 160 of the National Labor Relations Act, as amended by the Labor Management Relations Act, is made clear in *Nathanson, Trustee v. NLRB,* 344 U.S. 25 (1952), where the court said:

> "and where the matter in controversy had been entrusted by Congress to an administrative agency, the Bankruptcy Court normally should stay its hand pending an administrative decision. . . . It is the Board, not the Referee in Bankruptcy, nor the Court, that has been en-

> trusted by Congress with authority to determine what measures will remedy the unfair labor practices." (344 U.S. at 30.)

Thus, Congress has set up a specific agency for the determination of specific types of disputes, and the Bankruptcy Courts have properly accommodated themselves to this expression of Congressional intent. The situation with respect to arbitration, however, is exactly to the contrary since arbitration is not a creation of federal statute, but rather is the creature of a contract between private parties. *United Steel Workers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574 at 582-583 (1960); *Retail Clerks Local 770 v. Thriftimart, Inc.,* 59 C.2d 421, 380 P.2d 385 (1963).

NLRB v. Coal Creek Co., 204 F.2d 579 (10th Cir. 1953); *NLRB v. Baldwin Locomotive Works,* 128 F.2d 39 (3rd Cir. 1942); and *Matter of American Buslines,* 151 F.Supp. 877 (D.C. Neb. 1957), cited by appellants, all involved proceedings before the National Labor Relations Board and do not involve arbitration proceedings pursuant to Section 301 of the Labor Management Relations Act.

Appellants also cite Section 15 of the Labor Management Relations Act (29 U.S.C. § 165) as authority for their contention that the arbitration provisions of the contract supersede the provisions of the Bankruptcy Act. Said section provides as follows:

> "Section 165. Conflict of laws.
>
> Whenever the application of the provisions of Section 672 of Title 11 conflicts with the application of the provisions of this subchapter, this

> subchapter shall prevail: *Provided,* that in any situation where the provisions of this subchapter cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect."

Section 672 of Title 11 refers to the corporate reorganization provisions of the Federal Bankruptcy Act and has no applicability whatsoever to so-called straight bankruptcy. In this regard, Section 101 of Chapter X (11 U.S.C. § 501) provides that "the provisions of this chapter shall apply exclusively to proceedings under this chapter." In the case of *In the Matter of Klaber Bros.,* 173 F.Supp. 83 (S.D. N.Y. 1959), the court held that Section 15 did not apply to a debtor proceeding under Chapter XI of the Bankruptcy Act.

A distinction between Chapter X and other proceedings under the Bankruptcy Act is readily understandable when one reviews the purpose and intent of Chapter X. Chapter X looks to the reorganization of a debtor corporation with the emergence of the same from the Chapter X proceedings as a going concern. Furthermore, such proceedings frequently take many years during which time an active business is being conducted by the debtor. In straight bankruptcy proceedings there is a discontinuance of the business of the debtor and in effect its "corporate death."

Appellants' premise that the federal labor policy seeks to promote industrial stabilization through the collective bargaining agreement contains within itself the key to its limitation and the numerous cases cited

in support of said proposition do embrace this principle as between employees and an *existing bargaining unit.* When the latter ceases to exist the reason for enforcement of collective bargaining agreements also ceases to exist. All of the cases cited by appellants on pages 17 and 18 and the top of page 19 of their brief are devoted to circumstances involving disputes between employees and an existing employer.

The distinction between the existing business line of cases cited by appellants and a case where the employer has ceased to be in business is well expressed in *In the Matter of Muskegon Motors Specialties Co.,* 313 F.2d 841 (6th Cir.), *cert. denied,* 375 U.S. 832 (1963), where the Court stated:

> "In the case at bar, as the District Court found, labor peace was not an issue. The employer was out of business and had no plant or employees. The collective bargaining agreement had expired on April 14, 1961. Whatever rights the employees had for vacation pay under the collective bargaining agreement had already become fixed. All that remained was a question of law which, it seems to us, could be better passed upon by the court rather than an arbitrator. This case does not involve working conditions or practices in a shop, but the law of the land.
>
> "The cases where the Bankruptcy Court surrendered jurisdiction do not support the Union's position. In those cases, jurisdiction was surrendered either to another court of competent jurisdiction or to an administrative agency which was empowered by law to hear and determine the particular controversy." (313 F.2d at 843.)

Appellants attempt to deal with the *Muskegon* case by stating that the same is erroneous in light of *Republic Steel v. Maddox,* 379 U.S. 650 (1965). It is clear that the *Maddox* case in no way overruled or makes inapplicable the *Muskegon* case or the reasoning of the Court therein contained and cited above.

In *Maddox,* the Court in dicta stated that the arbitration provisions of a collective bargaining agreement must be followed even when there has been a permanent plant shutdown. This dicta, however, is not addressed to the situation where the employer no longer exists as is true in this case since the adjudication of The White House as a bankrupt. The Court explains its reasoning as follows:

> "If applicable law permitted a court suit for severance pay in any circumstances without prior recourse to available contract remedies, an employer seeking to limit the modes of redress that could be used against him could do so only by eliminating contract grievance procedures for severance pay claims." (379 U.S. at 656.)

If this Court holds in this case that appellants' claims are to be determined by the Bankruptcy Court, no multiplicity of remedies as is envisaged by the Supreme Court could arise since the sole remedy would be the one stated by the Bankruptcy Act, i.e., determination of claims against the estate by the Bankruptcy Court. Furthermore, upon his adjudication as a bankrupt, the employer no longer has any interest in the outcome of the union's claim. Thus, at the contract negotiation stage, the employer would not be

concerned about the remedies available to the union in the event of the corporation's ultimate bankruptcy.

The Court goes on in *Maddox* to state that there are no positive reasons why the general federal rule in favor of arbitration should not apply. As is stated above, the whole purpose of the jurisdiction conferred upon the Bankruptcy Court by Section 2 of the Bankruptcy Act is to provide a single forum for the determination of claims against the bankrupt estate in order to achieve an expeditious, efficient, and inexpensive administration of the bankruptcy estate. In the instant case complicated issues on the merits exist and the expense to the bankrupt estate of arbitration proceedings could and most likely would be considerable. The collective bargaining agreements also provide for a preliminary hearing before an adjustment board and then a resort to arbitration. This lengthy procedure could unduly delay the administration of the bankrupt estate. Furthermore, once a petition in bankruptcy has been filed, the rights of creditors are involved. The creditors of the bankrupt would have a right to participate in any hearings on the claim of the union held before the Bankruptcy Court (see Bankruptcy Act § 57, 11 U.S.C. § 93) whereas they would not be parties to an arbitration.

Of all the numerous cases cited by appellants in their brief, they do not cite, nor is there any reported instance where the arbitration provisions of a collective bargaining agreement have been held enforceable against a contracting employer undergoing

liquidation in a straight bankruptcy proceeding or against the trustee of such bankrupt estate. The only case on point is *In Re Muskegon Motor Specialties Co.,* supra.

It is submitted based upon the foregoing that the District Court was correct in determining that nothing in the National Federal Labor Policy or in national statutes requires the Bankruptcy Court to surrender its exclusive jurisdiction over the property of the debtor in favor of contractual provisions for arbitration. The appellants have shown no compelling reason why the normal rule in favor of the exclusive jurisdiction of the Bankruptcy Court should not apply in this case.[2]

Under Section 57d of the Bankruptcy Act (11 U.S.C. § 93d), the manner of liquidation of unliquidated claims is left to the discretion of the Bank-

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[2]Appellants cite the cases of *Tobin v. Plein,* 301 F.2d 378 (2nd Cir. 1962), and *Schilling v. Canadian Foreign S.S. Co.,* 190 F.Supp. 462 (S.D.N.Y. 1961) for the proposition that the trustee in bankruptcy may be compelled to submit a dispute to arbitration pursuant to the terms of a collective bargaining agreement. Neither of said cases stands for such a proposition. In *Tobin v. Plein,* supra, the trustee sought arbitration of a claim *in favor* of the bankrupt estate and the Court held merely that the provisions of Section 26 of the Bankruptcy Act (11 U.S.C. Section 49) did not supersede any contractual arrangements with respect to arbitration which may have existed. In the *Schilling* case, supra, the Court held that a trustee suing on a claim *in favor* of the bankrupt estate must abide by an arbitration provision in the contract upon which the trustee was suing. In neither instance would the Court have had summary jurisdiction pursuant to Section 2 of the Bankruptcy Act and said cases are completely inapposite to the proposition for which they are cited. In fact appellants correctly admit that the Court in *Schilling* implies that the rule would be otherwise where the party seeking arbitration is a creditor of the bankrupt.

ruptcy Court. It is within the power of the Referee in Bankruptcy to order liquidation of a claim by reference to arbitration and this is a matter which should be left to the sound discretion of the Referee. In 3 *Collier on Bankruptcy,* 243 (14th Ed. 1964), it is noted that arbitration is one of the means of liquidation of an unliquidated claim, but:

> "The Court, however, will ordinarily be inclined to reserve to itself some degree of control, be it by appointing the expert a special master or by otherwise securing to itself and the parties the power to treat the expert's estimate as a mere aid to the Court, the final word being with the latter."

Unlike the reviewability of arbitration initiated by the Bankruptcy Court as is contemplated by *Collier* above, the reviewability of a decision by a labor arbitrator is extremely limited. See *United Steel Workers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574 (1960).

In their request for arbitration, appellants seek not only to arbitrate the question of the amount of pensions due, and whether The White House breached the collective bargaining agreement, but also seek to arbitrate whether or not a trust existed and if so, whether or not the Unions are entitled to receive the full amount of their claims in priority to the claims of other unsecured creditors. As stated above, any such determination by an arbitrator would be reviewable only to an extremely limited extent. Thus, the relief sought in this case by arbitration by appellants is greater than the relief granted to the National Labor Relations Board by the Supreme Court in *Nathanson, Trustee v. NLRB,* 344 U.S. 25 (1952).

Even if this Court believes that under the facts of this case appellants are entitled to a *limited* arbitration, it would seem clear that the question of the priority of the claims of appellants is a matter to be determined by the Bankruptcy Court. See *Nathanson, Trustee v. NLRB,* supra, and *NLRB v. Deena Artware,* 207 F.2d 798 (6th Cir. 1953).

II

EVEN ASSUMING THAT SOME PORTION OF THE DISPUTES BETWEEN THE TRUSTEES AND THE UNIONS SHOULD BE SUBMITTED TO ARBITRATION, NO SHOWING HAS BEEN MADE TO SUSTAIN THE INJUNCTION GRANTED IN THE STATE COURT PENDING SUCH ARBITRATION.

The order entered by Judge Karesh in the state court proceeding was entered after The White House filed its petition in bankruptcy and after its adjudication as a bankrupt and therefore, after all of its property came into the custody of the Bankruptcy Court. The order was entered prior to the appointment of the trustees in bankruptcy and at a hearing where the receiver did not appear. (R.T. 21, 22, 43-46.) No attempt was made by appellants to obtain leave from the Bankruptcy Court to sue the receiver as is required by law. *Chicago R. I. & R. Ry. Co. v. City of Owatonna,* 120 F.2d 266 (8th Cir. 1941). The order was in fact entered at a time when there was in force an order issued by the Honorable Alfonso J. Zirpoli, Judge of the United States District Court, enjoining the further prosecution of suits against the bankrupt. (R. 47-48.) It is submitted that under the above circumstances

appellants should not be allowed to remove the sum of $158,000.00 from the custody of the Bankruptcy Court as required by the state court order.

Even absent the above circumstances, in order for the Court to grant an injunction under both the laws of the State of California and the Federal Rules of Civil Procedure, it is necessary for appellants to show that they would suffer irreparable injury were an injunction denied and that they have no other adequate remedy at law. *Foundry Services, Inc. v. Beneflux Corp.,* 206 F.2d 214 (2d Cir. 1953); *City & County of San Francisco v. Market St. Ry. Co.,* 95 Cal.App.2d 648, 213 P.2d 780 (1950). Appellants are unable to make such a showing since they could protect their position by filing a contingent claim in the bankruptcy proceedings while reserving their right to have the matter adjudicated by arbitration. See *In Re Dato,* 99 F.2d 703 (7th Cir. 1938). Since the estate could not be distributed until such time as appellants' contingent claim had been determined, no injury could result to appellants by the denial of the injunction.

The granting of the injunction does injury to the estate and to the other creditors interested therein. The trustees are required to deposit all funds of the estate in a bank account and are now authorized to place the same in a savings account, thus earning interest for the creditors while the estate is pending. Bankruptcy Act § 47a(2) (11 U.S.C. § 75a(2).) If the injunction is granted this interest would be lost to the estate.

It is also quite clear that appellants' claim, insofar as they seek to establish a trust claim having a priority over the claims of other unsecured creditors of The White House, is ill-founded and that the request for an injunction should be denied.

It is important preliminarily to note the factual basis upon which appellants' trust claim is made. In 1958, The White House as a member of the San Francisco Retailers Counsel, entered into a collective bargaining agreement with Department Store Employees Union Local No. 1100 RCIA. (Exhibit "A" of plaintiff's complaint in Superior Court.)[2a] Said agreement provided in part that either party to the agreement could reopen the same on June 1, 1959, or June 1, 1960, with respect to pensions. Pursuant to the terms of said agreement, the agreement was reopened with respect to pensions and on September 16, 1959, an agreement was reached with the Union whereby The White House agreed to set up certain pension benefits for its employees. Exhibit "B", pages 3-6.) The agreement provided that said pensions were to be funded but did not spell out the methods for funding the same. In accordance with the provisions of the said agreement of September 16, 1959, The White House subsequently entered into an agreement of trust with the Bank of America National Trust and Savings Association wherein The White House was the trustor and said bank was the trustee. (R. 95-111.) Pursuant t

[2a]Exhibits A, B, C, D and E of plaintiff's complaint in the Superior Court have been made a part of the Record on Appeal by stipulation between appellants and these appellees. Said exhibits will hereafter for convenience be referred to as "A", "B", et

the terms of said trust agreement, The White House agreed to make certain contributions to the trust to live up to its agreement under the terms of the collective bargaining agreement. In fact, contributions to said trust were made in the amount of $1,115.89 (Aff. of Walter Johnson, R. 91), and as to such sum, the trustees herein would concede that appellants have a valid trust claim.

The above facts are strikingly similar to those before the Court in the case of *McKey v. Paradise,* 299 U.S. 119 (1936). In that case, the bankrupt employer withheld certain amounts from the wages of employees which were to be paid over by the employer to a welfare association which provided health and other welfare benefits to the employees. The Supreme Court held that the breach of such an agreement did not give the employees any equitable title or lien upon any part of the bankrupt's property, stating:

> "It would be impossible to state all the circumstances in which equity will fasten a constructive trust upon property in order to frustrate a violation of fiduciary duty. See 3 Pom. Ed. Jur. Sections 1044 et seq. But the mere failure to pay a debt does not belong in that category. We do not find that the record shows anything more than that in this instance. (Citing cases.) The fact that the failure to pay the association was an acute disappointment and was especially regrettable as the claimant was an association of employees cannot avail to change the debtor to a trustee or enable the creditor to obtain a preference over other claims against a bankrupt estate." (299 U.S. at 122-123.)

> proceedings. §64(a)(2). We would depart from that policy if we granted the priority to one class of wage claimants irrespective of the amount of the claim or the time of its accrual. The theme of the Bankruptcy Act is 'equality of distribution' *(Sampsell v. Imperial Paper & Color Corp.,* 313 U.S. 215, 219, 85 L.Ed. 1293, 1298, 61 S.Ct. 904); and if one claimant is to be preferred over others, the purpose should be clear from the statute. We can find in the Bankruptcy Act no warrant for giving these back pay awards any different treatment than other wage claims enjoyed." (344 U.S. at 28-29.)

Similarly, in *United States v. Embassy Restaurant,* 359 U.S. 29 (1959), the court denied priority under factual circumstances quite similar to those now before the court. In that case, the bankrupt employer had been bound by the terms of a collective bargaining agreement to contribute to a welfare fund for the benefit of employees. The court refused to grant any priority status to such contributions.

Appellants' position that they are entitled to a priority position although they are unable to establish that a trust existed, or that there is any particular *res* or fund which they can identify is contrary to every precept of the bankruptcy law and the relief sought cannot properly be granted without doing violence to the provisions of the Bankruptcy Act and working irreparable prejudice to all of the other creditors who are entitled to look to that Act for their protection.

It was this precise concern which moved the court to deny the type of injunctive relief sought here in

NLRB v. Deena Artware, 207 F.2d 798 (6th Cir. 1953). There, as here, the amount due to employees was unliquidated but was estimated to be $100,000.00. As in the present case, the petitioners there sought an order restraining the employer from transferring assets on the ground that it was deliberately depleting its assets to avoid payment of any award which might be made for back pay. In refusing to issue such an order, the court stated that not only had no actual damage as yet been established, but even after establishment, such claims would have no priority over other creditors in the event of insolvency.

III.

THE COURT BELOW PROPERLY DENIED APPELLANTS' MOTION TO REMAND.

A. A suit to compel arbitration pursuant to the terms of a collective bargaining agreement between an employer and a labor organization representing employees in an industry affecting commerce is one founded on a claim or right arising under the constitution, treaty, or laws of the United States so as to make it removable within the meaning of Section 1441 (b) of Title 28 of the Judicial Code (The Removal Statute).

Congress in 1947 adopted Sections 301(a) and (b) of the Labor Management Relations Act (29 U.S.C. §§185(a) and (b)) which provide as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district

court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member of his assets."

A majority of the Supreme Court in *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957) held that Section 301 was not merely a jurisdictional statute, but was intended by Congress to allow the federal courts to fashion a sustantive body of federal labor law involving disputes between employers and unions who are parties to collective bargaining agreements. The doctrine of the majority in the *Lincoln Mills* case was further elucidated by the Court in *Teamster's Union v. Lucas Flower Co.,* 369 U.S. 95 (1962), wherein the Court held that although the state courts have concurrent jurisdiction with the federal courts in suits arising under Section 301, that nevertheless federal substantive law must be applied in such cases.

It is clear from *Lincoln Mills, Lucas Flower* and *Dowd Box v. Courtney,* 368 U.S. 502 (1962), that actions under Section 301 are actions arising under the laws of the United States, that both the federal and the state courts have concurrent jurisdiction with respect thereto and that in an action arising under Section 301 federal substantive law must be applied. The situation is thus similar to numerous federal statutes creating substantive rights where Congress has provided the federal and state courts with concurrent jurisdiction, but where a defendant in such an action is given the right by Section 1441 to remove the same to the federal courts. This interpretation of Section 301 is the one universally followed by the federal courts. See, *e.g., Old Dutch Farms Inc. v. Milk Drivers & Dairy Employees Union Local 584,* 222 F. Supp. 125 (E.D.N.Y. 1963); *Central Metal Products v. International Union,* 195 F. Supp. 70 (E.D. Ark. 1961); *Swift & Co. v. United Packing House Workers,* 177 F. Supp. 511 (D.C. Colo. 1959); *Minkoff v. Grant & Frocks,* 172 F. Supp. 870 (S.D. N.Y. 1959); *Fay v. American Cystoscope Makers,* 98 F. Supp. 278 (S.D.N.Y. 1951).[3] In certain instances wherein both the federal and the state courts are given concurrent jurisdiction, Congress has expressly denied removal. See, *e.g.,* Federal Employers' Liability Act (28 U.S.C. §1445(a)); Securities Act of 1933 (15

[3]The majority opinion in *American Dredging Co. v. Local 25, Marine Div., Int. U. of Op. Eng.,* 338 F.2d 837 (3rd Cir. 1964), *cert. denied,* 380 U.S. 935 (1965), is not to the contrary since the court held that the District Court was deprived of jurisdiction by Section 4 of the Norris-LaGuardia Act (29 U.S.C. §104).

U.S.C. §77v). There is no such provision with respect to Section 301(a).

Appellants contend that removal is prohibited by *Dowd Box,* supra. That case holds that Section 301 does not invest the federal courts with exclusive jurisdiction but merely grants jurisdiction which is concurrent with that of the state courts. Appellants argue that removal is not permitted where such concurrent jurisdiction exists, but that removal would only be permissible where exclusive jurisdiction is in the federal court. This is contrary to current law which holds that removal jurisdiction is "derivative jurisdiction" and can only be exercised if the state court has original concurrent jurisdiction. There can be no "derivative jurisdiction" where the federal courts have exclusive original jurisdiction. *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.,* 258 U.S. 377 (1922).

Appellants contend that the memorandum of points and authorities filed by them in the state court shows that the action was one commenced under state law, to-wit: Section 1280 of the California Code of Civil Procedure. A case commenced under the California Arbitration Act (California Code of Civil Procedure §§1280 et seq.) may nevertheless be a suit arising under Section 301(a). See *Retail Clerks' Local 770 v. Thriftimart,* 59 C.2d 421, 380 P.2d 652 (1963).

B. The Court can look to the petition for removal to determine the status of the parties.

It has been held that even where the petition for arbitration in a state court does not reveal that the action is one falling under Section 301(a) (in that the petition for arbitration does not reveal the necessary relationship to interstate commerce), the Courts may look to the petition for removal to ascertain the status of the parties as affecting interstate commerce. *Minkoff v. Grant & Frocks, Inc.,* supra; *Fay v. American Cystoscope Makers,* supra. See also *Davenport v. Proctor & Gamble Manufacturing Co.,* 241 F. 2d 511 (2d Cir. 1957) (may look to petition for removal to determine jurisdictional amount).

There is an exception to the general rule cited by appellants that the basis for removal must be shown on the face of the plaintiff's complaint (*Gully v. First National Bank in Meridian,* 299 U.S. 109 (1936); *Pan American Petroleum Corp. v. Superior Court of Delaware,* 366 U.S. 656 (1961)), where the missing allegation concerns the status of one of the parties to the action. *Winters v. Drake,* 102 Fed. 545 (C.C.N.D. Ohio 1900).

The Court in *Fay v. American Cystoscope Makers,* supra, at pages 280-281, elucidated this exception as follows:

> "The normal rule in removal proceedings prohibits the court from looking outside the complaint, to determine whether or not a suit arises under federal law. . . . (Citations) However, where federal jurisdiction hinges on the parties, or one of them, having a particular status, the

court may ascertain the existence of that status independently of the complaint. This latter rule has been applied to permit the court to ascertain the existence of diversity of citizenship, see, Chappell v. Waterworth, 1894, 155 U.S. 102, 107, 15 S. Ct. 34, 39 L.Ed. 85, and the federal nature of a receiver, Winters v. Drake, C.C., 1900, 102 F. 545, a corporation, Texas & Pacific Ry. C. v. Cody, 1897, 166 U.S. 606, 17 S.Ct. 703, 41 L.Ed. 1132, and a marshal, Wood v. Drake, C.C., 1895, 70 F. 881.

"The jurisdiction of the district court under 29 U.S.C.A. §185 depends upon one of the parties' holding a particular status, that is, a union representing employees in an industry affecting commerce. Where that status is asserted to exist, but is not mentioned in the complaint, the court is of the opinion that it may apply the status rule on removal and look beyond the complaint to ascertain the fact. To hold otherwise would vest the plaintiff with power to withhold from a defendant the use of that forum which Congress has chosen to make available.

"Such power in the plaintiff could only be justified if Section 185 left intact a separate and independent state cause of action for contract between unions and employers where the component of interstate commerce was present. . . . However, . . . it seems clear that Congress preempted the field in this area."

The above language was approved in IA *Moore's Federal Practice* §160 (2nd Ed. 1965.)

C. Removal was proper since the federal question involved was disclosed by voluntary statements made by appellants in the state court proceedings.

Section 1446(b) of Title 28 allows removal within twenty days after the filing of the plaintiff's complaint or within twenty days after the filing by the plaintiff of some other paper first disclosing the federal question involved. It has been held that such "other paper" can consist of oral testimony so long as the same is a part of the record of the proceedings in the state court. *Fuqua v. Gulf, Col. & Santa Fe Ry. Co.,* 206 F.Supp. 814 (E.D. Okla. 1962); *Bonnell v. Seaboard Airline R.R. Co.,* 202 F.Supp. 53 (N.D. Fla. 1962); *Gilardi v. Atchison, Topeka & Santa Fe Ry. Co.,* 189 F.Supp. 82 (N.D. Ill. 1960). Roland C. Davis, Esq., counsel for appellants, made it abundantly clear during the hearings conducted before Judge Karesh in the Superior Court that petitioner's claim for arbitration was one arising under the National Labor Relations Act. The following quotations from the reporter's transcript of the hearings held before Judge Karesh amply bear out this position:

> "Mr. Davis: In any event, I advised him (Referee Gillard) of our position that in view of the proceedings of the National Labor Relations Act, I had asked this Court to continue these proceedings so that I could file a memorandum to establish to this Court's satisfaction that the National Labor Relations Act provisions prevailed over the Bankruptcy Act, and that you could proceed . . ." (R.T. 6.)
>
> "Mr. Davis: Yes, Your Honor. As I explained it at the hearing yesterday, as to which this is a

> continued hearing, in our view, Section 15 of the National Labor Relations Act is the basis for this Court's paramount jurisdiction over the Referee in Bankruptcy in a matter such as this, and this matter is a matter which arises under a collective bargaining contract between an employer of the Union which are subject to the terms of the National Labor Relations Act and Section 301 of that Act provides, and the United States Supreme Court has so held, that the Courts, both the state courts and the federal District courts, have jurisdiction to require the parties to a collective bargaining contract to arbitrate the controversy arising under that contract where the contract provides for arbitration as we say it does here." (R.T. 15.) (See also, R.T. 7.)

The above quoted voluntary statements made by counsel for appellants at the hearings before Judge Karesh adequately disclose the federal question involved and allowed removal to the federal district court under the provisions of Section 1446(b) of Title 28.

From the foregoing, it is evident that the removal was proper and that the order of the District Court denying the motion for remand should be sustained by this Court.

CONCLUSION

As has been above stated, upon the filing of a petition in bankruptcy and the adjudication of the debtor as a bankrupt, the Bankruptcy Court is vested with exclusive jurisdiction over all assets in the actual or constructive possession of the bankrupt. This jurisdiction is not lightly surrendered by the Bankruptcy Court. Appellants have been unable to show any law which would require the Bankruptcy Court to cede such jurisdiction, nor have they given any reasons why the Bankruptcy Court in the exercise of its judicial discretion should surrender such jurisdiction in favor of arbitration. Arbitration might delay the administration of the bankrupt estate and would result in unnecessary expense to the estate.

It is also clear that the appellants' claim, if any, is merely an unsecured claim against the bankrupt estate and that appellants have failed to show that they would be irreparably injured by the failure of this Court to sustain an injunction which has the effect of disposing of assets which are presently in the custody of the Bankruptcy Court. It is thus respectfully submitted that this Court affirm the order of March 23 entered by the United States District Court dissolving the orders entered in the state court.

Section 301 vests concurrent jurisdiction in the state and federal courts, and a defendant in an industry affecting interstate commerce has the right to remove an action under Section 301 commenced in the state courts to the federal courts under the provisions of 28 U.S.C. § 1441. The record of the proceed-

ings before Judge Karesh show that appellants were relying on the provisions of Section 301 and the uncontested allegations of the petition for removal show that appellee The White House was in an industry affecting interstate commerce. The denial of the motion for removal was thus proper.

Dated, San Francisco, California,
August 9, 1965.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

EDWARD R. STEEFEL,
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